United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

77-7237

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRITISH AIRWAYS BOARD AND
COMPAGNIE NATIONALE AIR FRANCE,

Plaintiffs-Appellees,

-against-

THE PORT AUTHORITY OF NEW YORK
AND NEW JERSEY, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
For the Southern District of New York

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SECOND CIRCUIT

MEMORANDUM OF BRITISH AIRWAYS BOARD AND
COMPAGNIE NATIONALE AIR FRANCE IN RESPONSE
TO THE AMICUS BRIEF OF THE UNITED STATES

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MEMORANDUM OF BRITISH AIRWAYS BOARD AND COMPAGNIE NATIONALE AIR FRANCE IN RESPONSE TO THE AMICUS BRIEF OF THE UNITED STATES

The United States in its amicus brief states its agreement with the plaintiff airlines that the Port Authority has acted illegally in frustrating the federally-sanctioned Concorde demonstration by prohibiting the aircraft from operating at Kennedy Airport pending further Port Authority study.

The United States says that the Port Authority by its ban on Concorde operations at JFK "has diminished

measurably the value of" the Concorde demonstration and "has . . . deprived the United States of . . . the good will of our allies which would flow from a fair test of the Concorde." (U.S. Amicus Br., p. 3.)

That is the Government's view of policy. On the law, the Government says that the Port Authority's "actions have been unfair, dilatory, arbitrary and unreasonable" (id. at 26-27), and that, however large the power of airport proprietors, it does not extend to "discriminatory or unreasonable" exclusions (id. at 19).

The airlines agree with the Government that the Port Authority has been unreasonable, unfair and discriminatory in declining even to give the Concorde the opportunity to prove itself. The airlines agree with the Government that, apart from any other consideration, the unreasonable, unfair and discriminatory effect of the Port Authority's action is enough to condemn it as outside the sanction of supreme federal law.

There is no question that Congress, in exercising its Commerce Clause powers, may leave room only to state or local action as advances and is consistent with federal policy, and proscribe action that is offensive to federal policy. Compare former Section 10(a) of the National Labor Relations Act, 29 U.S.C. § 160(a), as construed in Guss v. Utah Labor Relations Board, 353 U.S. 1 (1957). Just the

other day the Supreme Court ruled that the venerable federal Enrollment and Licensing Act, while allowing the states to enact and enforce statutes bearing on federally-licensed vessels that affect residents and non-residents alike, as in Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960), preempted state action that, in its regulation of licensed vessels, discriminated against non-residents of the state. Douglas v. Seacoast Products, Inc., 45 U.S.L.W. 4488, 4493 n.21 (U.S. May 23, 1977).

In effect, the Government's position here is that Congress conditioned the reservation of power to airport proprietors on responsible, reasonable, non-discriminatory exercise of such power. Whether the Government is right or wrong in perceiving any such reservation in Section 611 of the Federal Aviation Act -- and we submit that it is wrong -- it is plainly right in believing that at the very least airport proprietors may not discriminate or otherwise act unreasonably when they seek to regulate aircraft noise. There is, moreover, an express requirement of fairness, reasonableness and non-discrimination in another federal statute to which the Port Authority is subject in its operation of JFK. Section 18 of the Airport and Airway Development Act, 49 U.S.C. § 1718, provides that "[a]s a condition precedent to his approval of an airport

development project. . . , the Secretary [of Transportation] shall receive assurances in writing, satisfactory to him, that . . . the airport to which the project for airport development relates will be available for public use on fair and reasonable terms and without unjust discrimination." The Port Authority has made those undertakings of fairness, reasonableness and non-discrimination in seeking and obtaining federal assistance for the construction, enlargement and modernization of JFK.

Thus, the Government is correct that, even on the view it takes of the limited preemptive effect of federal aviation statutes on airport proprietors' noise regulations, the decision below should be affirmed because the Port Authority has acted here in a way that exceeds even the reserved powers that the Government attributes to it.

The airlines, however, believe that the Government reads the law too expansively for airport proprietors' powers and too narrowly for its own authority to preempt. Federal law, properly construed, leaves no room at all for the Port Authority to interfere with the federally-licensed test of Concorde. We have so demonstrated in our main brief. We answer contrary contentions of the Government in succeeding sections of this Memorandum.

I

THE PORT AUTHORITY'S BAN ON CONCORDE FLIGHTS IS PREEMPTED BY A PERVASIVE NATIONAL SCHEME OF REGULATION OF AVIATION

The rationale of City of Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973) -- that the comprehensive federal statutory system of regulation of airspace management, aircraft operations and aircraft noise precludes inconsistent local action -- governs this case. Under that rationale, the Port Authority may not prohibit Concorde flights.

The United States agrees that, "with respect to certain areas of aviation regulation, such as control of navigable airspace, establishment of air navigation facilities, operation of the air traffic control system and certification of pilots and aircraft, Congress has mandated preemptive federal authority to be exercised by the Federal Aviation Administration." (U.S. Amicus Br., p.7.) The Government also agrees that "there is an obvious need for unified control to repose in a single authority for reasons of safety and efficiency." (Id.)

However, the Government argues that Congress has not wholly preempted airport proprietors, such as the Port Authority, from regulating aircraft operations at airports to reduce aircraft noise. The sole basis for this view is

the Government's reading of the legislative history of Section 611 of the Federal Aviation Act as amended by the Noise Control Act of 1972.

> "[W]hen Congress enacted Section 611 of the Federal Aviation Act as amended by the Noise Control Act of 1972, 49 U.S.C. 1431 -- the principal aviation noise statute -- it expressed the intent that local airport proprietors not be preempted from enforcing operational rules to reduce aircraft noise provided that such regulations do not discriminate or unduly burden interstate or foreign commerce." (Id. at 8.)

In our view, this reading of the legislative history conflicts with the Supreme Court's reading of the same history in Burbank and with two important cases that follow Burbank: Air Transport Ass'n v. Crotti, 389 F. Supp. 58 (N.D. Cal. 1975); and San Diego Unified Port District v. Superior Court, 67 Cal. App. 3d 361, 136 Cal. Rptr. 557 (1977), petition for hearing denied, Cal. Sup. Ct., April 28, 1977. It is also inconsistent with the position taken by the United States in other forums on other occasions.* For that reason, it is entitled to no

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* For the convenience of the Court, we attach as an appendix portions of the following briefs submitted on behalf of the United States or its aviation agencies: Opinion of the Department of Transportation and the Federal Aviation Administration submitted to the Supreme Judicial Court of Massachusetts re: In the Matter of Senate Bill No. 1161 (as amended) Pending Before the House of Representatives of the

(Footnote continued)

special weight on account of its auspices. We first demonstrate the Government's inconstancy of view and then show that the position it currently takes is wrong on the merits.

A. The United States Has Previously Expressed the Position That Local Action Such as the Port Authority Ban on Concorde is Invalid

In 1971 the United States was asked to submit to the Supreme Judicial Court of Massachusetts its views on the constitutionality of legislation aimed at Concorde that would forbid takeoffs or landings by supersonic transport planes which could not satisfy specified noise criteria. See Opinion of the Justices, 359 Mass. 788, 271 N.E.2d 354 (1971). Formal legal opinions were submitted by the three federal agencies most concerned with the regulation of

(Footnote continued)

Commonwealth of Massachusetts (undated); Statement on Behalf of the Civil Aeronautics Board by its Counsel, submitted to the Supreme Judicial Court of Massachusetts, dated May 18, 1971; Amicus Brief of the United States submitted to the United States Supreme Court in City of Burbank v. Lockheed Air Terminal, Inc. (No. 71-1037) filed January 12, 1973; Amicus Brief of the United States submitted to the United States District Court for the Northern District of California in Air Transport Ass'n v. Crotti (N.D. Cal. No. C-72-2189) (three-judge court), served May 31, 1974. Also included in the appendix is a portion of the DOT/FAA Aviation Noise Abatement Policy Statement, dated November 18, 1976.

References to these briefs and to the ANAP Statement are cited "App. ___." References to the first two briefs and to the ANAP Statement will also include citations to the Joint Appendix.

aviation. (App. 1-3; JA 407a-420a.) One opinion was submitted jointly by the Department of Transportation and the Federal Aviation Administration; the Civil Aeronautics Board submitted a separate opinion.

The conclusion of the DOT and FAA was that Congress had so preempted regulation of airspace and aircraft operations as to preclude enforcement of the proposed ban on landings and takeoffs.

DOT and FAA found support for their views in two cases decided by this Court. American Airlines, Inc. v. Town of Hempstead, 272 F. Supp. 226, 231-33 (E.D.N.Y. 1967), aff'd, 398 F.2d 369 (2d Cir. 1968), cert. denied, 393 U.S. 1017 (1969); Allegheny Airlines, Inc. v. Village of Cedarhurst, 132 F. Supp. 871 (E.D.N.Y. 1955), aff'd, 238 F.2d 812, 814-15 (2d Cir. 1956). As this Court is aware, the Town of Hempstead had purported to regulate permissible noise levels of aircraft and the Village of Cedarhurst had enacted an ordinance purporting to regulate the altitude of flight. DOT/FAA thought that the practical effect of Massachusetts' proposed SST ban was no less an attempt to regulate air traffic and airspace than the Cedarhurst and Hempstead ordinances. DOT/FAA concluded that, if Massachusett's proposed SST ban were upheld, "it would likely spread to other major airports and . . . hobble the supersonic aircraft as an instrument of national

and world transportation. . . ." They also said that: "A proliferation of this type of local regulation could eventually stagnate and destroy the national air transportation system." (JA 416a-417a.)

Legislation was the subject of the Opinion of the Justices, but the DOT/FAA opinion did not suggest any artificial distinction between the sovereign capacity of a governing body and its capacity as an operator of an airport. The DOT/FAA opinion, though noting that the Secretary of Transportation had recognized in a letter to a congressional committee in 1968 that "State and local agencies as airport proprietors might limit the use of their airports on a nondiscriminatory basis," concluded its discussion with the statement that "[t]hese recent statutes [Section 611 and the Airport and Airway Development Act of 1970] should remove any doubt which may have existed as to federal preemption of regulation of air traffic or use of airspace." (JA 415a.)

The Civil Aeronautics Board concurred in the opinion submitted by the DOT and FAA. It said that the issue was "squarely governed" by this Court's decisions in Cedarhurst and Hempstead. (JA 419a.) And the CAB was explicit that a public airport proprietor had no more authority than a sovereign legislative body. It said that "an attempt to proscribe or regulate the flight of

aircraft by any state instrumentality is equally forbidden, and this irrespective of whether it takes the form of a state law, a municipal ordinance, or a directive from the manager of an airport owned or controlled by state or municipal bodies." (App. 3; JA 420a.)

The next occasion for the expression of the Government's view was the Burbank case itself. When that case was in the District Court and the Court of Appeals, the United States argued that Burbank's curfew was invalid because, as minor an intrusion as it was, it was an impermissible intrusion into an area of exclusive federal regulation. (App. 3.) In the Supreme Court, the Solicitor General changed position and argued against preemption, and in so doing, he urged that the distinction that the Court of Appeals had drawn in its opinion between police power and airport proprietor authority produced a "logically bizarre result." (App. 5.) While arguing that Burbank's curfew was valid, the Solicitor General conceded that "as respects 'airspace management' there is preemption." 411 U.S. at 627. It was this concession that Mr. Justice Douglas, speaking for the Supreme Court, was to find "fatal" to the Government's new position.

The modest, deferential position taken in the Supreme Court in Burbank was not the Government's stance for long. Three years ago the United States submitted a brief amicus curiae in Air Transport Ass'n v. Crotti, 389

F. Supp. 58 (N.D. Cal. 1975). At issue there were regulations for the control of aircraft noise to be implemented by airport proprietors in California. Although the United States here contends that Burbank "is of little use in the resolution of this controversy" (U.S. Amicus Br., p. 10), in Crotti the United States' position was that Burbank was "[a]t the absolute center" of the case. (App. 6.) The Government seemed to have learned from Burbank a lesson that it has forgotten here -- that exclusive federal management of airspace means that there can be no local control of aircraft in flight.

The Government asserted that the so-called SENEL (Single Event Noise Exposure Levels) regulations challenged in Crotti were invalid because they affected aircraft directly engaged in flight operations by imposing a noise exposure limitation and thus ran squarely into federal airspace management.

> "The thrust of the Single Event Noise Exposure Levels is clear and direct, and it collides head-on with Federal regulatory scheme central to the Burbank decision. Therefore, California's SENEL Regulations must fall as a result of preemption by Federal law." (App. 8.)

On the other hand, the United States supported the validity of the CNEL (Community Noise Equivalent Levels) regulations, which principally called for monitoring of aircraft noise,

because "[t]hey do not affect air safety, and they do not intrude upon the Federal domain of flight operations and airspace management." (App. 7.) Concluding that the Burbank decision did not affect an airport proprietor's power to control activities relating to their own facilities and that Burbank's rationale should not be broadened to destroy the States' monitoring efforts, the United States urged the court to uphold the CNEL regulations on the grounds that "monitoring certainly has no influence upon commerce;" that "[t]he monitoring of noise levels is an entirely passive function;" and that monitoring "involves no more than stationary machines measuring and recording sound data." (Id.)

Finally, the Government's most recent statement on noise regulation takes the position that local regulation of noise may not override national purposes, a position sharply at variance with the stance it takes here. The Statement of the Department of Transportation on Aviation Noise Abatement Policy, issued November 18, 1976, states:

> "Pursuant to the general federal interest in the free flow of interstate and foreign commerce. . . and the specific FAA responsibility for regulating the air navigation system, the federal government has the obligation to assure that assure that airport proprietor actions to meet local needs do not conflict with national and international purposes." (App. 9; JA II-58.)

In reliance on this Statement, Judge Pollack found that "the policy allowing the airport proprietor to impose use restrictions pertinent to the perceived local noise problem, is a delegated authority reviewable by and subject to the overriding control of federal authority when exercised." (JA 168a.)

B. Burbank and its Progeny Support the Position of the Airlines that the Federal Government Has So Preempted the Regulation of Airspace and Aircraft Operations as to Preclude Enforcement of the Port Authority Ban On Concorde

In City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973), the Supreme Court struck down a curfew imposed by the City Council of Burbank, California. The curfew ordinance made it unlawful for jet aircraft to take off from the privately-owned airport in Burbank during certain periods. The only regularly scheduled flight affected by the ordinance was an intrastate flight of Pacific Southwest Airlines, which departed from the Hollywood-Burbank Airport every Sunday night at 11:30 p.m. Mr. Justice Douglas held for the Court that the "pervasive nature of the scheme of federal regulation of aircraft noise" foreclosed even this very limited interference with the flight of aircraft in commerce. 411 U.S. at 633.

It is true that the Supreme Court in Burbank did not expressly consider "what limits, if any, apply to a municipality as a proprietor," 411 U.S. at 636 n.14, but in its rationale Burbank leaves no room for an airport proprietor to ban the Concorde -- action that directly affects the Federal Government's regulation of airspace and aircraft operations.

The Court found that, if curfews were imposed on a nationwide basis, there would be "'a serious loss of efficiency in the use of the navigable airspace.'" 411 U.S. at 628. Citing the opinion of Judge Dooling in the Hempstead case, Mr. Justice Douglas made the point, repeatedly recognized by this Court, that an "'aircraft and its noise are indivisible,'" and that to exclude "'aircraft noise . . . is to exclude the aircraft.'" Id.

The Supreme Court held that "the pervasive control vested in EPA and in FAA under the 1972 [Noise Control] Act seems to us to leave no room for local curfews or other local controls." Id. at 638.* The 1972 Noise Control Act

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* The dissenters in Burbank did not disagree with the position of the majority that Congress had conferred on the Federal Government the authority to preempt all local action. To the contrary, Mr. Justice Rehnquist found that Congress had "very likely" conferred on the FAA authority sufficient to authorize preemption of all local action. 411 U.S. at 653. Thus, the position now taken by the United States that Congress intended to grant local airport proprietors the ultimate authority to ban aircraft flies in the face of the views of all members of the Court in Burbank.

had amended Section 611 of the Federal Aviation Act, 49 U.S.C. § 1431, a provision that on its face empowers the Federal Aviation Administration (in cooperation with the Environmental Protection Agency) to "prescribe and amend such regulations as the FAA may find necessary to provide for the control and abatement of aircraft noise and sonic boom." Judge Pollack in his opinion below aptly described this statute much as the Supreme Court had in Burbank:

> "This statute again was broadly drafted and its express provisions leave no doubt of adequate statutory authority paramount to that of airport proprietors in the regulation of noise and noise abatement. The Act passed by Congress is facially unequivocal and makes clear the federal government's exclusive statutory responsibility for noise abatement through regulation of flight operations and aircraft design." (JA 163a-164a.)

The Supreme Court in Burbank, like the District Court below (JA 163a-164a), directly confronted the legislative history of Section 611, which the United States here extravagantly describes as creating congressionally-imposed "constraints" on federal authority to preempt action of airport proprietors. The Supreme Court found that the history did not "avail" the municipality and the dissenters agreed that it was not of "controlling significance." 411 U.S. at 634; id. at 651 (dissent). To the Court, "a uniform and exclusive system of federal regulation [was required] if the congressional objectives underlying the Federal Aviation Act are to be fulfilled." Id. at 639.

The Court held that "[w]e are not at liberty to diffuse the powers given by Congress to FAA and EPA by letting the States or municipalities in on the planning. If that change is to be made, Congress alone must do it." Id. at 640. The Court's emphasis on uniformity and the need to preserve intact the powers of the federal aircraft noise agencies even as against a most limited curfew is utterly inconsistent with any thought that airport proprietors are free not merely to impose curfews but even to prohibit whole categories of flight.

At the time of the Supreme Court's decision, the Hollywood-Burbank Airport was the only private airport serving air carriers in the United States. It would be a strange kind of uniformity that allowed every airport in the country other than that one to enact measures affecting airspace management and aircraft operations. Indeed, Mr. Justice Rehnquist stated in dissent that it "strains credulity to believe that the Secretary, the Senate Committee, or Congress intended that all airports except the Hollywood-Burbank Airport could enact curfews." Id. at 652.

The Government would have this Court follow the decision of Judge Peckham in National Aviation v. City of Hayward, 418 F. Supp. 417 (N.D. Cal. 1976). Although the Government, in applauding this strangely literal opinion, is not prepared to recognize that it is inconsistent with

Burbank's emphasis on the need for uniformity and federal exclusivity, Judge Peckham himself candidly acknowledged that his decision could "severely undercut the rationale of Burbank's finding of preemption." Id. at 424.

Moreover, the Hayward decision is in conflict with the decision of a three-judge court in Crotti. There it was held, adopting the Government's advice in that case (pp. 10-12, supra), that local regulations affecting aircraft flight "are a per se unlawful exercise of police power into the exclusive federal domain of control over aircraft flights and operation, and airspace management and utilization in interstate and foreign commerce." 389 F. Supp. at 65. Holding invalid the SENEL regulations because they collided "head-on with the federal regulatory scheme for aircraft flights delineated by and central to the Burbank decision," the court in Crotti upheld the CNEL regulations because they were "innocuous to aircraft traffic"; and "the monitoring of noise levels at and near airports is a passive function involving ground noise measuring machines and recording sound volume data which in no wise intrude upon or affect flight operations and air space management in commerce." Id. at 64-65.

The most recent pertinent opinion is that of the California District Court of Appeal for the Fourth District in San Diego Unified Port District v. Superior Court, 67

Cal. App. 3d 361, 136 Cal. Rptr. 557 (1977), petition for hearing denied, Cal. Sup. Ct., April 28, 1977. In that case the court held that federal laws and regulations preempt local control of aircraft flights. The court held that, if a curfew interferes with Burbank's requirement of uniformity, "it should make no difference whether the curfew is imposed on the authority of local police power or the owner's proprietary power. The impact of the curfew remains the same. . . ." 136 Cal. Rptr. at 561.

C. The Port Authority Ban Is Not In Any Case a Noise Regulation Which Congress Might Have Intended To Preserve Under Section 611

There is one more word to be said concerning the Government's current position as to the sweeping effect of the legislative history of Section 611 in preserving airport proprietors' power to act to control aircraft noise. Even on the Government's reading of the legislative history of Section 611, all that is reserved to airport proprietors is the regulation of noise.

That portion of the Government's argument which rightly characterizes the Port Authority's Concorde action as "unfair, dilatory, arbitrary and unreasonable," while couched in legal terms of discrimination, demonstrates that the Port Authority has not acted solely to regulate noise. The basis of the Government's characterization of the Port Authority's action is this:

> "Unlike previous instances where airlines have sought to introduce new aircraft at Kennedy, the Port Authority in this case has banned the Concorde by refusing to decide whether its noise is acceptable. Under the guise of studying the matter, the agency has deprived the operators of a finding on its acceptance, and has deprived them as well of the opportunity to show that under existing applicable Port Authority noise standards, the Concorde can achieve a level of compliance equal to that of other aircraft now using the airport." (U.S. Amicus Br., p. 20.)

The Port Authority's resolution is simply not noise regulation by an airport proprietor. The Concorde ban is admittedly not based upon any present noise standard of the Port Authority. (JA 431a.) It was ostensibly related to a six-month study, not only of noise, but also of other unspecified environmental matters. We submit that this Court can properly conclude that whatever power Congress may have intended to reserve to airport proprietors in the regulation of noise, it was not the power to prohibit indefinitely, without any rational basis in noise criteria, federally-authorized service by a particular aircraft.

II

THE PORT AUTHORITY'S CONCORDE BAN IS IN IRRECONCILABLE CONFLICT AND IS THUS PREEMPTED BY SECRETARY COLEMAN'S DECISION AND THE OPERATIONS SPECIFICATIONS ISSUED THEREUNDER

The Government suggests that Judge Pollack erred in finding an irreconcilable conflict between Secretary Coleman's Concorde Decision and the Port Authority's Concorde ban. Its suggestion rests upon two assertions that are demonstrably incorrect as a matter of record. The first of these is that the administrative process that culminated in the Coleman Decision was concerned solely and simply with the amendment of operations specifications in the ordinary sense. Based on this narrow view of the administrative process, the Government concludes:

> "If, as the district court apparently believed, the issuance of operations specifications reflecting Concorde service was preemptive, no airport operator could ever regulate operations to reduce noise since federal approval or amendment of operations specifications is necessary with respect to all air carrier flights. Thus, we submit that the particular actions of the Secretary of Transportation and the Federal Aviation Administration cannot be said to have invalidated State and local regulations on grounds of conflict." (U.S. Amicus Br., p. 18.)

The administrative proceedings culminating in the Coleman Decision were sui generis, as Judge Pollack

recognized. All past proceedings involving the issuance or amendment of operations specifications involved relatively simple safety determinations by the FAA. As Secretary Coleman noted, the process has been "almost automatic." (JA 51a.) Never before has there been a public hearing on operations specifications. Never before has an environmental impact statement been prepared in connection with the issuance or amendment of operations specifications. Never before have operations specifications been issued to any carrier containing noise or environmental limitations, much less the detailed noise abatement procedures prescribed for Kennedy Airport in this case. Never before has the FAA issued provisional operations specifications; and never before has the power been reserved to revoke them at any time based upon environmental monitoring. Never before has the Secretary of Transportation personally intervened to decide "unprecedented issues of public policy" concerning operations specifications (JA 51a); and never before has a requested amendment of operations specifications been found to "serve other statutory ends" (JA 62a) within the mandate of the Secretary of Transportation. On this record, it is incorrect for the Government to argue that, if the Coleman decision and implementing action of the FAA are preemptive, then "no airport operator could ever regulate operations to reduce noise." (U.S. Amicus Br., p. 18.)

The second basic misconception underlying the Government's "no conflict" position is that Secretary Coleman's role in the administrative process can be dismissed as one of merely undertaking "the detailed environmental assessment which ultimately led to his determination to authorize amendments of the carriers' operations specifications. . . ." (U.S. Amicus Br., p. 18.) Secretary Coleman did much more than that. He made a basic decision "whether to permit Concorde supersonic transport aircraft . . . to operate in limited scheduled commercial service to and from the United States as follows: not more than four flights per day into John F. Kennedy International Airport (JFK) located on Long Island, New York. . . ." (JA 51a.) He made the "overall decision whether to permit Concorde operations" on the basis of his resolution of "substantial questions of environmental and aviation policy and international relations." (JA 62a.) And he issued explicit orders to the FAA pursuant to the powers conferred on him by 49 U.S.C. §§ 1651(a), 1651(b)(1), and 1346. (JA 62a-63a.)

He did not simply order the issuance of amended operations specifications to the carriers as suggested in the Government's brief. He directed that the carriers' amended operations specifications include detailed terms and conditions governing Concorde operations. He ordered the FAA to set up monitoring systems for Concorde noise and

emissions levels at both Kennedy and Dulles Airports and to report the results. (JA 54a.) He initiated a federal proposal for international agreement (since concluded) with the British and French Governments to use the authorized Concorde flights to monitor ozone levels in the stratosphere. (JA 55a.) And he directed the FAA to proceed with a proposed High Altitude Pollution Program to develop data necessary for national and international regulation of aircraft operations in the stratosphere. (JA 54a.)

The panoply of actions taken by Secretary Coleman or initiated in Secretary Coleman's Concorde Decision together comprise a federal program undertaken pursuant to the Secretary's statutory authority to test and determine the economic, environmental and technological feasibility of commercial supersonic service. Secretary Coleman viewed the carriers' applications for operations specifications as presenting an opportunity, in his words, to "serve other statutory ends." (JA 62a.) His power to order a 16-month trial period for the Concorde has been tested and judicially determined to be "within his authority and competence." Environmental Defense Fund v. U.S. Department of Transportation, No. 76-1105 (D.C. Cir. May 19, 1976), cert. denied sub nom., Bd. of Super. of Fairfax County v. Coleman, 97 S. Ct. 385 (1976). Judge Pollack rightly concluded that the Port Authority's ban of the Federal demonstration at Kennedy Airport is self-evidently in irreconcilable conflict with this valid Federal action.

III

THE PORT AUTHORITY'S CONCORDE BAN IS AN INVALID INTERFERENCE WITH THE POWER OF THE FEDERAL EXECUTIVE TO CONDUCT FOREIGN RELATIONS AND IMPAIRS UNITED STATES OBLIGATIONS UNDER INTERNATIONAL AGREEMENTS

The Government's amicus brief underscores the serious international implications of this case. The Government says that "the Port Authority's action has also deprived the United States of other important benefits, the most significant being the good will of our allies which would flow from a fair test of the Concorde." (U.S. Amicus Br., p. 3.) Quoting from a statement by President Carter, the Government says that the Concorde experiment would serve as a "'basis for reaffirming the close ties between the United States and Britain and France. . . .'" (Id.) The Government further states that "[i]t would be ironic and unfortunate if [the Port Authority and the State of New York] were to suffer and the country as well from a diminution of international good will caused by [the Port Authority's] refusal to participate in this temporary, limited Concorde demonstration." (Id. at 4.) Additionally, the Government notes that "the President has clearly stated that for both domestic and foreign policy reasons, it is in the best interests of the country to continue the demonstration at Dulles Airport and to begin it at Kennedy Airport." (Id. at 13.)

The Constitution entrusts the Federal Government, and more particularly the Executive, United States v. Curtiss-Wright Corp., 299 U.S. 304, 318 (1936), "with full and exclusive responsibility for the conduct of affairs with foreign sovereignties." Hines v. Davidowitz, 312 U.S. 52, 63 (1941). In Zschernig v. Miller, 389 U.S. 429 (1968) the Supreme Court struck down an Oregon Statute, even after the Federal Government had stated to the Court that "[t]he government does not . . . contend that the application of the Oregon escheat statute in the circumstances of this case unduly interferes with the United States' conduct of foreign relations." Id. at 434. The Court held in Zschernig that state regulations "must give way if they impair the effective exercise of the Nation's foreign policy." Id. at 440. It further concluded:

> "Yet, even in the absence of a treaty, a State's policy may disturb foreign relations. As we stated in Hines v. Davidowitz . . . 'Experience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government.' . . . If there are to be such restraints, they must be provided by the Federal Government. The present Oregon law is not as gross as intrusion in the federal domain as . . . others might be. Yet, as we have said, it has a direct impact upon foreign relations and may well adversely affect the power of the central government to deal with those problems.

> "The Oregon law does, indeed, illustrate the dangers which are involved if each State . . . is permitted to establish its own foreign policy." Id. at 441.

Here the Federal Government has stated expressly that the action by the Port Authority has a direct and adverse effect on the relations between the United States and the United Kingdom and France. In these circumstances, the plenary responsibility of the Federal Government for the conduct of United States' foreign policy dictates that the action by the local government be set aside. Whatever the merits of the Government's position that, in passing Section 611 of the Federal Aviation Act, Congress did not intend to vest authority in the Federal Government, no statutory authority is needed for the Federal Government to assert its predominant authority over the conduct of foreign relations.

* * *

The airlines and their Governments have urged in prior briefs that, apart from any other consideration, the bilateral air services agreements between the United States, the United Kingdom and France entitle the carriers to operate Concorde aircraft at JFK and establish that the Port Authority may not lawfully prevent such service. We rest our case on that issue on our prior brief and the amicus brief of the United Kingdom and France.

CONCLUSION

The task of judgment on the issues raised by this litigation belongs to this Court. The Government itself suggests that the judgment of the District Court should be affirmed, thereby vindicating the federal and international rights of the plaintiffs. Nothing in its legal reasoning offers any persuasive basis for this Court to do otherwise.

Respectfully submitted,

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APPENDIX

I.

Position Taken By United States Government In Opinion of The Justices, 359 Mass. 788, 271 N.E.2d 354 (1971) re: In The Matter of Senate Bill No. 1161 (as amended) Pending Before the House of Representatives of the Commonwealth of Massachusetts.

A. Excerpts from Opinion of The Department of Transportation and The Federal Aviation Administration

"This opinion urges this Court to find in its Advisory Opinion concerning the question of law presented by the House of Representatives that the Commonwealth of Massachusetts is not constitutionally competent to enact any law which regulates or prohibits the operation of supersonic aircraft at airports within the Commonwealth of Massachusetts, for the reasons that the Federal Government has preempted the regulation of airspace and aircraft operations, and because the Commerce Clause of the United States Constitution requires that air commerce be regulated by a single authority, the Congress of the United States." (JA 407a.)

* * *

"In enacting the Federal Aviation Act, it was the intention of Congress to establish the right of every citizen to freedom of transit through the navigable airspace of the United States and to facilitate the exercise of that right by a federal regulatory scheme which promotes safe and efficient air commerce. The enactment of an ordinance or law by a local government that has the effect of prohibiting airplanes from using navigable airspace obviously is inconsistent with the objectives of federal law. Accordingly, local legislation with objectives different than those Congress has sought to achieve must yield."

"The conclusion that Senate Bill No. 1161 purports to regulate an area preempted by legislation of the national government finds support in prior decisions holding that the federal government has preempted the area of regulation of air traffic and use of airspace. See American Airlines, Inc. v. City of Audubon Park, 297 F. Supp. 207 (W.D. Ky. 1968),

aff'd, 407 F.2d 1307 (6th Cir. 1969); American Airlines, Inc. v. Town of Hempstead, 272 F. Supp. 226, 232-33 (E.D.N.Y. 1967), affirmed without reaching preemption issue, 398 F.2d 369 (2d Cir. 1968), cert. denied, 393 U.S. 1017 (1969); Allegheny Airlines, Inc. v. Village of Cedarhurst, 238 F.2d 812, 814-15 (2d Cir. 1956)."

"In its practical effect, Senate Bill No. 1161 is an attempt by the legislature to regulate air traffic and airspace. It is no less an attempt at such regulation than a local ordinance purporting to regulate the altitude of flight (as in the Audubon Park case, supra, and the Cedarhurst case, supra) or the permissible noise levels of aircraft (as in Hempstead, 398 F.2d 369). Indeed, Senate Bill No. 1161 constitutes the ultimate regulation. By banning supersonic transport takeoffs and landings, it completely forbids a certain type of air traffic and a certain use of airspace." (JA 414a.)

* * *

"In sum, Senate Bill No. 1161 cannot stand because it results in a regulation of the use of airspace and of air traffic. Since the federal government 'has taken the particular subject in hand,' the Commonwealth is precluded from enforcing its legislation. Charleston & W. C. Ry. v. Varnville Furniture Co., 237 U.S. 597, 604. This result follows 'however commendable . . . different' the purpose of the local regulation. Napier v. Atlantic Coast Line R., 272 U.S. 605, 613." (JA 415a.)

* * *

"Senate Bill No. 1161, the Act now pending in the Legislature of the Commonwealth of Massachusetts, is invalid since it attempts to regulate in a field preempted by Congress and because the Commerce Clause of the Constitution requires that air commerce be regulated by a single authority, the Congress of the United States. Its effect would be to place a burden on interstate and foreign commerce, by prohibiting the operation of a certain aircraft type at at least one major interstate and international air terminal, which terminal (Logan International Airport) is a vital part of the National Airport System." (JA 416a.)

B. Excerpts from Statement on Behalf of the Civil Aeronautics Board By Its Counsel

"Here the proposed enactment by the state in terms purports to regulate the flight of aircraft, and as such, constitutes a forbidden intrusion into areas of Federal regulation and concern. In our view, an attempt to proscribe or regulate the flight of aircraft by any state instrumentality is equally forbidden, and this irrespective of whether it takes the form of a state law, a municipal ordinance, or a directive from the manager of an airport owned or controlled by state or municipal bodies." (JA 420a.)

II.

Position Taken By United States Government In Lockheed Air Terminal, Inc. v. City of Burbank, 318 F. Supp. 914 (C.D. Cal. 1970), aff'd sub nom. City of Burbank v. Lockheed Air Terminal, Inc., 457 F.2d 667 (9th Cir. 1972), aff'd, 411 U.S. 624 (1973).

A. Amicus curiae briefs submitted to District Court and Court of Appeals

"In amicus curiae filings in the courts below in this case, the Federal Aviation Administration supported the position of appellees herein that Burbank's ordinance is invalid under the Supremacy Clause, on the grounds that the subject has been preempted by the federal government and that the ordinance conflicts with federal regulation." (Amicus Brief of the United States at 4, City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973))

B. Excerpts fr[illegible] Position taken before the S[illegible]eme Court

"Subsequently, however, a thorough review of the legislative history underlying the Federal Aviation Act of 1958 and subsequent enactments bearing on the issues has persuaded us that Congress did not intend to preclude local regulation of the sort here entailed, and that, on the contrary, Congress has consistently proceeded on the premise that State and local governments retain the power, in order to shield persons residing around airports from undesirable aircraft noise, to impose night curfews and restrictions on aircraft types that may utilize their airports (as long as there is not any impermissible burdening of interstate commerce)." (Id. at 4.)

* * *

"In reaching the conclusion that the night curfew ordinance of the City of Burbank violated the Supremacy Clause by seeking to regulate in a federally-preempted area, the court of appeals relied heavily on the comprehensiveness of the scheme of federal regulation of aviation activities. We agree that Congress, through the Federal Aviation Act, has created a comprehensive system of federal regulation. However, descending from broad generalities about the scope of federal regulation to a more precise analysis of the content of the Act and its underlying legislative history, it becomes apparent that the system of federal regulation is only preemptive in part, and that there are significant areas of concurrent or primary State and local jurisdiction."

"Among the areas in which there appears to be a clear federal preemption of State regulation are the following: The regulation of routes, rates, and other economic facets of interstate, overseas, and foreign air carrier operations, which is committed to the jurisdiction of the Civil Aeronautics Board; air traffic control, airspace management, licensing of airmen, certification of aircraft and engines (including noise emission standards), all committed to exclusive federal regulation through the Federal Aviation Administration (FAA)."

"On the other hand, matters, such as the location and size of airports, land use planning around airports, and management of the airports are primarily left to State and local decision, subject to a degree of federal supervision through such means as conditions in agreements for federal airport funding. As a practical matter, many facets of airport utilization, including control of aircraft noise on and around airports, are subject to concurrent federal and State/local jurisdiction. Federal control is exercised primarily through airspace and air traffic regulation, and State/local control by limiting access to the airport itself or particular facilities thereon." (Id. at 8.) (Footnotes omitted)

* * *

"The primary question to which we address ourselves in this brief is whether the area of exclusive federal regulation of air commerce encompasses the

imposition of restrictions on the use of airports by certain types of aircraft or at certain times of the day. That there is a very substantial segment of air commerce, including all aspects of airspace management, flight navigation, and safety, from which the States are excluded from the exercise of any regulatory power by federal preemption is scarcely subject to dispute. See Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292, 303 (Jackson, J., concurring). Nor can it be doubted, given the intimate relationship between the operation of aircraft and interstate commerce, that Congress could assume exclusive dominion over various facets of airport regulation, including the subject of operational curfews, if it considered it necessary or desirable to bring such matters within the ambit of centralized federal regulation. The issue in this case, however, is not whether the power to exclude State and local regulations exists, but whether it has in fact been exercised." (Id. at 12.)

* * *

"The court of appeals, in response to Burbank's argument that the legislative history indicates a non-preemptive congressional intent, relied upon this distinction to explain away the thrust of the Senate report's approving reference to the letter of the Secretary of Transportation (S. Rep. No. 1353, supra). That letter had asserted continuing State and local authority in the area of noise regulation through airport control. The court stated (A. 422-423):

> 'A State or local public agency, as the proprietor of an airport, can deny the use of its airport based on noise consideration; a State or local government cannot use its police power to do so.' [Footnote omitted.]

We cannot agree that this distinction applies to the determination whether the Burbank ordinance seeks to regulate in a federally preempted area. In the first place, it leads to a logically bizarre result. Since nearly every major airport in the United States is governmentally owned (Burbank being the most significant, if not the only, exception among airports used by certificated air carriers), the result of the

court of appeals' reasoning is that there is a federal preemption policy affecting at most a handful of airports in the entire nation. The considerations of uniform national policy or centralized federal decision-making that ordinarily support preemption would not be furthered by a preemption having such insignificant national impact, and Congress should not be assumed to have legislated such a result in the absence of clear evidence of such intent." (Id. at 45-46.)

* * *

"[I]t is quite clear that the status of a local government as a proprietor, Griggs notwithstanding would not insulate it from the exercise of federal control, to the extent Congress deems such control desirable in the execution of its powers and responsibilities under the Commerce Clause. Finally, as noted above, perpetuation of a proprietorship-police power distinction makes no practical sense in terms of the development of a rational and uniform federal policy, since the preemption thereby created would have such marginal effect. The distinction drawn by the court of appeals is thus not supported by the legislative history and not consonant with the practicalities of the situation." (Id. at 48.)

III.

Excerpts from Position Taken By United States Government In Air Transport Ass'n v. Crotti, 389 F. Supp. 58 (N.D. Cal. 1975)

"At the absolute center of this case lies a statement made by Justice Douglas, writing for the Supreme Court in the case of City of Burbank v. Lockheed Air Terminal, 411 U.S. 624, 533 (1973):

> 'That Act [the Noise Control Act of 1972] reaffirms and reinforces the conclusion that FAA, now in conjunction with EPA, has full control over aircraft noise, preempting state and local control.'" [Emphasis supplied.]

* * *

"Justice Douglas reasoned that Federal control of airspace management, including timing of airspace usage was essential to avoid the 'bunching' of flights during particular hours. Such 'bunching' nationwide would decrease the efficiency of airspace usage, increase congestion and noise during those hours not subject to curfew, and, as a result of increased congestion, adversely affect the overall safety of aircraft operation. 411 U.S. at 627-628, 639. Those considerations are undeniably crucial, and, as the Solicitor General conceded, their complete commitment by Congress to Federal authorities necessarily preempts efforts by local governments to intrude into airspace management."

"Having so established the fact that airspace management lies exclusively within the domain of Federal power, the Burbank opinion went on to explain that the Noise Control Act of 1972, as it amends the Federal Aviation Act of 1958, vests exclusively in FAA and EPA the control of noise emitted by aircraft during flight operations. In sum, since operational noise control can only be regulated by Federal authorities, a local government cannot regulate such operational noise by using its police power to manipulate flight timings." (Id. at 5.)

* * *

"Measured against the rationale of the Burbank decision, the monitoring provisions of the California airport noise abatement scheme easily withstand a constitutional challenge based upon preemption. They do not affect air safety, and they do not intrude upon the Federal domain of flight operations and airspace management. Furthermore, monitoring certainly has no influence upon commerce. The monitoring of noise levels is an entirely passive function. It involves no more than stationary machines measuring and recording sound data. Clearly, not even research into the subject area of noise levels can occur without the accumulation of such data." (Id. at 10.)

* * *

"While California's monitoring and CNEL regulations are constitutionally sound either because they lie well outside the Burbank's holding and

rationale or because they fall within the proprietor exception recognized in Note 14 of that decision, the same cannot be said for the State's SENEL regulations. By levying criminal fines for violations which occur when an aircraft is in the air, the State is attempting to intrude in the exercise of its police power into the exclusive Federal domain of flight operations and airspace management and utilization. The thrust of the Single Event Noise Exposure Levels is clear and direct, and it collides head-on with Federal regulatory scheme central to the Burbank decision. Therefore, California's SENEL regulations must fall as a result of preemption by Federal Law." (Id. at 20.)

IV.

Excerpts from Position Taken by The Department of Transportation and Federal Aviation Administration In Aviation Noise Abatement Policy, November 18, 1976

"The legal framework with respect to noise may be summarized as follows:

1. The federal government has preempted the areas of airspace use and management, air traffic control, safety and the regulation of aircraft noise at its source. The federal government also has substantial power to influence airport development through its administration of the Airport and Airway Development Program.

2. Other powers and authorities to control airport noise rest with the airport proprietor - including the power to select an airport site, acquire land, assure compatible land use, and control airport design, scheduling and operations - subject only to Constitutional prohibitions against creation of an undue burden on interstate and foreign commerce, unjust discrimination, and interference with exclusive federal regulatory responsibilities over safety and airspace management.

3. State and local governments may protect their citizens through land use controls and other police power measures not affecting aircraft operations. In addition, to the extent they are airport proprietors, they have the powers described in paragraph 2." (JA II-34.)

* * *

"While the airport proprietor is best situated to judge the local noise problem and to determine how to respond to it, he is not always in the best position to judge the impact of his noise reduction proposal on the national and international air transportation systems. Because of the intricacy of those systems, use restrictions at a single airport could, under certain circumstances, cause wide-spread disruption throughout those systems. Pursuant to the general federal interest in the free flow of interstate and foreign commerce, the constitutional principle that states and local entities may not impose undue burdens even where Congress or federal agencies have not acted, and the specific FAA responsibility for regulating the air navigation system, the federal government has the obligation to assure that airport proprietor actions to meet local needs do not conflict with national and internaticnal purposes." (JA II-58.)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRITISH AIRWAYS BOARD AND COMPAGNIE NATIONALE AIR FRANCE,

Plaintiffs-Appellees,

-against-

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY, et al.,

Defendants-Appellants.

No. 77-7237

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

STEPHEN FROLING, being duly sworn, deposes and says:

I am an attorney admitted to practice in the Courts of the State of New York and a member of the Bar of this Court.

On this 8th day of June, 1977, I served two copies of the annexed Memorandum of British Airways Board and Compagnie Nationale Air France upon all parties required to be served herein and upon all amici, by mail, or by causing the same to be delivered personally to a clerk or other person in the office of the following attorneys, at the address designated by each for said purpose, to wit:

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Sworn to before me
the 8th day of June, 1977

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